IN THE SUPREME COURT OF NEW ZEALAND

SC 11/2004
[2005] NZSC 57

ATIRUT SUNGSUWAN

v

THE QUEEN

Hearing: 7 April 2005

Court: Elias CJ, Gault, Keith, Blanchard and Tipping JJ

Counsel: R M Lithgow and N Levy for Appellant
B J Horsley and A Markham for Crown

Judgment: 25 August 2005

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS

ELIAS CJ

[1] Atirut Sungsuwan appeals against his conviction on two counts of sexual violation. The defence at trial was that sexual activity between the complainant and the appellant was consensual. The complainant's evidence was that she was protesting loudly and unmistakably. She was angry that others present in the flat where the assaults took place did not come to her help since she believed they would have heard her yelling at the appellant to stop and go away. Two Crown witnesses, who had been in an adjoining room at the time, gave evidence at trial that they heard sounds from the complainant they considered to be of consensual sexual activity. In earlier statements to the police the witnesses had claimed to have heard similar noises from the complainant on other occasions when she had been having sexual intercourse with her boyfriend. That account of previous sexual behaviour was not before the jury. Its absence was one of the grounds upon which Atirut Sungsuwan appealed, unsuccessfully, to the Court of Appeal. For the reasons given by Gault J, I am of the view that the absence of the potential evidence has given rise to no miscarriage of justice in the present case and that the appeal must be dismissed on this ground and the other grounds advanced. I write separately only on the approach where a ground of appeal is based upon the conduct of the defence by counsel at trial.

[2] Section 383 of the Crimes Act 1961 permits anyone convicted on indictment to appeal against the conviction. Such general appeal has been available as a matter of right since 1991, as s 25(h) of the New Zealand Bill of Rights Act 1990 requires. Unless in application of the proviso to s 385(1) the Court considers that "no substantial miscarriage of justice has actually occurred", the appeal must be allowed under s 385(1) of the Act if the Court of Appeal is of opinion:

> (a) That the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence; or

(b) That the judgment of the Court before which the appellant was convicted should be set aside on the ground of a wrong decision on any question of law; or

(c) That on any ground there was a miscarriage of justice; or

(d) That the trial was a nullity.

[3] The grounds of appeal advanced in the Court of Appeal on behalf of the appellant included the ground based on s 385(1)(c) that there had been a miscarriage of justice because

> [c]rucial evidence from Crown witnesses J and N relating to noises allegedly made by the complainant when having consensual sex with her boyfriend on previous occasions was "absent".

It is common ground that the reason such evidence was "absent" was because counsel for the appellant had not sought to elicit it from the witnesses in cross-examination. She had formed the views both that leave would be required under s 23A of the Evidence Act 1908, because the evidence concerned the complainant's previous sexual history, and that such leave was unlikely to be given.

[4] In the Court of Appeal, this ground of appeal was re-cast by the Court as one of counsel error:

> [21] It is clear that the "absent" evidence was not admissible as of right, because of s 23A of the Evidence Act. Ms Ord [trial counsel] did not apply for leave to call the evidence. There can be, therefore, no criticism of either the Judge or the prosecutor for the fact that this evidence was not called. This potential evidence was known to defence counsel, but she chose not to make the application. This ground of appeal can succeed only if it can be shown that defence counsel, in failing to apply, made a "radical mistake or blunder": see *R v Pointon* [1985] 1 NZLR 109 (CA). Mr Lithgow shied away from accusing Ms Ord of having made an error of that sort, but that must be in truth the focus of this ground of appeal. It is not a recognised ground of appeal simply to point to other evidence which might have been called, at least in circumstances where such evidence was known to counsel at the time of the trial.

[5] In application of *R v Paparahi*,[1] the Court considered that it was "necessary to determine whether Ms Ord's decision not to seek leave under

[1] (1993) 10 CRNZ 293, 297 (CA).

s 23A was plainly wrong, i.e. without foundation". The Court of Appeal was of the view that there was no certainty that leave would have been granted and pointed to "significant potential downsides for the defence" had any such application been successful, which would have to be weighed by experienced counsel. It concluded that the ground of "radical error" had not been made out:

> [45] It is unnecessary for us to determine whether an application under s 23A would have been successful. Given the high threshold presented by s 23A and the other relevant factors to which we have referred, there was at least some proper foundation for the decision of defence counsel not to seek leave under s 23A. Consequently there was no radical error by defence counsel.

[6] Miscarriage of justice does not arise because of incidental errors or irregularities in the trial, unless they amount to denial of the right to fair trial contained in s 25(a) of the New Zealand Bill of Rights Act or unless they are significant enough in themselves to cause the appellate Court to consider the verdict to be unsafe. Where the ground of miscarriage of justice under s 385(1)(c) is made out, application of the proviso to s 385 is not likely to be appropriate. It is difficult to envisage that a verdict reached without fair trial or which is unsafe will not amount to a substantial miscarriage of justice.

[7] Counsel error is not itself a ground of appeal under s 385(1). The inquiry is not into the competence of counsel but whether the verdict is unsafe through any deficiency in the trial, however caused. Where, as here, the basis of the ground of appeal is that relevant and admissible evidence was not called (whether because it was not reasonably available at trial or because counsel did not choose to call it), the effect of its absence will have to be assessed. The context may include the cogency of the evidence not called, the other evidence at trial, any additional evidence likely to have been elicited in response had the evidence been called, and any risk to the defence in calling the evidence.

[8] In the present case, the Court of Appeal's approach distracted from the proper inquiry. The focus upon whether counsel had fallen into "radical error" by failing to seek leave under s 23A of the Evidence Act and the test

applied (whether the decision not to seek such leave was "without foundation") was misconceived. In *R v Pointon*,[2] Cooke J made it clear that his reference to "radical error" was a reference to error in the trial itself which went to trial adequacy:[3]

> Such cases do not turn on whether there has been negligence. That is not the issue. Miscalculations can occur for which counsel, perhaps making tactical decisions under pressure, is not necessarily to be criticised. Nevertheless they can force an appellate Court to treat the trial as unsatisfactory.

[9] The Court of Appeal here treated radical error as being concerned with the conduct of counsel. It held that, because there was "some foundation" for the decision of counsel not to seek leave to cross-examine, there was no radical error and no need to consider whether there was a likelihood of "consequential" miscarriage of justice. That approach wrongly treated "radical error" of counsel as a precondition for consideration of the "consequential" question of miscarriage of justice. And it invited a retrospective and partially subjective review of the trial circumstances and tactics. The question for the appellate court was the objective one whether the absence of the evidence gave rise to a miscarriage of justice.

GAULT, KEITH AND BLANCHARD JJ

(Given by Gault J)

[10] The appellant, a Thai national, was convicted upon retrial in the District Court at Wellington of the rape and prior sexual violation by digital penetration of a Chinese woman student in the bedroom of a flat at Miramar. His appeal against conviction was dismissed in the Court of Appeal in a judgment delivered on 11 August 2004. Leave to appeal to this Court was granted to challenge three aspects of the decision. They call for consideration of the handling of the trial by counsel for the appellant, the conduct of prosecuting counsel and rulings from the judge relating to evidence of recent complaint.

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[2] [1985] 1 NZLR 109 (CA).
[3] At 114.

[11] While each aspect will be dealt with separately, their cumulative impact must be assessed. The three matters canvassed call for consideration under s 385(1)(c) of the Crimes Act 1961 by which an appeal against conviction is to be allowed if on any ground there was a miscarriage of justice. A miscarriage is said to have arisen in this case, first, because additional evidence was not given that might have been given by two witnesses who were in the next bedroom at the critical time and heard sounds from the events next door. Secondly, it is said that knowing of the evidence that was not given (because of the shield in s 23A(2) of the Evidence Act 1908), Crown counsel addressed the jury improperly. Thirdly, in three rulings the trial Judge is said to have erred in disallowing recent complaint evidence of one witness, ruling that he could not be cross-examined on the point, and allowing evidence of a later complaint to be given by another witness.

The facts

[12] A broad factual background was explored in the evidence, presumably in an effort to give the jury the general lifestyle and relationships among those who gave evidence. Much of that is unnecessary for our present purpose.

[13] For a period up to the beginning of February 2002 when her boyfriend left for overseas the complainant shared a bedroom in the flat with him. The next door bedroom was occupied by J. She was also a Thai national. She had previously lived at Porirua with two others, a brother and sister of the same nationality. The brother is the appellant. His sister, N, was the most proficient of the three with the English language. J, with the appellant and perhaps also his sister N, were in the process of establishing a small business together in Wellington.

[14] On the morning of 28 March 2002 the complainant was told by her boyfriend M, who was overseas, that their relationship was over. She was upset by that. She arranged to go out that evening with J. J said the complainant spoke of wanting "to bring some guy to come sleep with her"

and that "she was frustrated and wanted to have sex with someone that night". After they had met up with J's friends, N, the appellant and his male friend V, the complainant was said to have asked how old the appellant was and to have been told his wife and child were shortly to come to visit. The complainant's version of the discussions was different. She agreed that because her boyfriend had dumped her she had said she was going out to "have fun, get a guy" but she denied saying that she intended to bring anyone home or having that in her mind. Overall the evidence of the subsequent discussion relating to the appellant went no further than a question about his age.

[15] The group eventually went to a night-club in Wellington. The evidence of contact between the complainant and the appellant was of her accompanying him to the bar to explain what drink she wanted and of dancing for one song during which she said he tried to kiss her (which he denied). J and the appellant decided they should leave because N was drunk and had vomited. The complainant wanted to stay but was persuaded by J to leave with them. It was then early Friday morning.

[16] According to the appellant, when walking to the car the complainant twice asked him to have sex with her. She denied that. When they reached the flat at Miramar the complainant went inside first while the appellant and J assisted N. The complainant made herself a drink and went to her room where she lay on her bed. The appellant helped take N into J's room. He told them the complainant had asked him for sex. He then went to the kitchen where he ate some food V was preparing. After that he went to the complainant's room where the sexual activity occurred.

[17] The complainant's evidence was that she protested and struggled. She said "No, go away" "heaps and heaps of times", "I think I was screaming a lot 'cos I want someone else to come to my room and help me out". No one came and when he finished he left. She described experiencing pain afterwards and seeing blood when she wiped herself with a tissue.

[18] The appellant's evidence was of normal consensual sex. He denied the complainant was protesting. He referred to the complainant making the usual style of sounds when two people have sex though he thought the complainant was louder than other women.

[19] Shortly after the appellant left the complainant's room V entered and tried to get on to the bed. The complainant yelled at him to get out. A short time later J appeared at the door. V then went out of the room and very soon afterwards the appellant and V left the house.

[20] There was a good deal of evidence of the complainant's demeanour and conduct over the next 18 or so hours. In summary, she was extremely upset, tearful, hysterical. She drank vodka until she became very drunk. She exhibited hostility towards her flatmate J and towards N who stayed overnight. She made a number of phone calls but was incoherent. After sleeping she made further phone calls of which more must be said later. Eventually in the evening she arranged for a friend to collect her. She was taken to the police where she made a complaint of rape. The same evening she was medically examined.

[21] The medical evidence was of a small laceration at the entrance to the vagina, still bleeding at the time of examination, and pinpoint bruises around the upper aspect of the vagina. The doctor's opinion was that consensual intercourse as the cause was "extremely unlikely".

[22] At the trial the Crown called J and N. J gave evidence of events over the whole period. She generally agreed with the complainant's narrative of the evening although differing in respect of the complainant's stated intention to get a guy and have sex. When asked whether she heard noise coming from the complainant's room while the appellant was there she said she "heard some noise like someone making love". And when V had gone to the room she heard screaming and the words "Get out, get out". In the course of cross-examination there were these questions and answers:

Q. Now, you've told us [though in fact she had not said it in her evidence] that after [the appellant] left [J's] room, that you heard some moaning and groaning sounds coming from what you thought was [the complainant's] room, is that right?

A. Yes.

Q. And there was no sounds like screaming coming from [the complainant's] bedroom at that time was there?

A. Nothing at all.

Q. And from your point of view, it sounded like someone was having just normal sex next door, would that be right?

A. Yes, because I heard this sort of sound before.

…

Q. Now there was no yelling coming from the bedroom at all was there?

A. No nothing.

Q. There was nothing like [the complainant] yelling, "no, stop it, don't do that" anything like that?

A. No.

[23] J had made a statement to the police some time after the alleged offending when an interpreter was available. In that she said:

> As far as I know [the appellant] went into [the complainant's] room after coming in to my room. After he left I heard moaning and groaning coming from [the complainant's] room. I have heard this before when she was in her room with her [former] boyfriend [M]. The complainant is quite noisy when she has sex.
>
> I could only hear [the complainant] I didn't hear [the appellant] at all.
>
> The noises [the complainant] was making were like she was enjoying having sex. It didn't sound like she was in trouble or screaming or yelling for help or anything like that.
>
> I heard this for roughly 20 minutes.

[24] N's evidence at the trial was that she first met the complainant at a party. That was proved to have been on 24 February 2002. She agreed that on the evening of the events with which we are concerned she had been drunk and had gone to bed in J's room. She said the appellant came in and told them the complainant had asked him for sex. He went to her room. She was asked if she heard screams. She said she had but she did not think it was a scream for help. The cross-examination on the point was as follows:

> Q. And you've told my learned friend that a short time later you heard some sounds coming from the bedroom next door, is that right?
>
> A. Yes.
>
> Q. And you described it to him a moment ago as a scream, is that right?
>
> A. Yes.
>
> Q. Now it wasn't a loud scream was it?
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> A. It was quite loud but yeah.
>
> Q. And from your point of view, was it – it wasn't a scream from someone who was frightened was it?
>
> A. Not at all.
>
> Q. It wasn't a scream from someone who sounded as though they needed help was it?
>
> A. No.
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> Q. From your point of view, was it more like the sound of a person having a sexual intercourse?
>
> A. Yes.
>
> Q. Was there anything wrong with the sound that you heard from your point of view?
>
> A. No it was a satisfied – it was quite loud, some girls do make loud noise.

> Q. Now did you ever hear [the complainant] yelling, get out, get out or anything like that?
>
> A. Not even a word, no.
>
> Q. Now did you hear her yelling anything like, no, no?
>
> A. Not at all.

[25] N had made a statement to the police the evening after the incident. In that she said:

> They would have been in the room for 5-10 minutes during that I remember hearing a scream, it wasn't a scream fear or for help it was more like a scream of having a good time like she was coming.
>
> I have heard this type of screaming coming from her before when she was having sex with her boyfriends. I have said to her before that she screams quite loud.

[26] The evidence from J and N from their statements which was not given at the trial is that asserting that they had heard the type of noise they heard from the next bedroom on other occasions when the complainant was having consensual sex.

[27] After a waiver of privilege from the appellant (though it is not apparent what privilege could have existed) trial counsel provided an affidavit in which she explained:

> I was aware that evidence that [J] and [N] had some familiarity with previous sounds made by the complainant during consensual sexual activity would have strengthened their evidence that the sounds heard on the night in question were consistent with such activity. I considered making a s23A application to adduce such evidence. I have some recollection of discussing the matter with Ms Clark, the prosecutor at the first trial. I cannot recall whether I raised the matter with the judge at the first trial. I have no record of doing so, but can not rule out the possibility that it was discussed at some stage.
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> As a result of discussions that I had (with Crown counsel and possibly the judge at the first trial), and my own views of the matter, I decided that I would not get leave to cross-examine on this topic because the evidence related to the complainant's previous sexual

> experience. Accordingly I did not make a formal application for such leave.

[28] In his closing address to the jury Crown counsel made this submission:

> Another red herring you might be invited to chase, is that you'll be asked to consider [N] and [J's] evidence of there not being screaming, and if had they heard it, they would immediately have intervened. And of course they did so, no doubt about that at all, when they heard [the complainant] scream, and [V], the other male in the room. Well, you might think all that evidence suggests to you, is that either first [N] and [J] either mistook with tragic consequences for [the complainant] what it was they were hearing, or else they just callously sat there and allowed [N's] brother, [J's] friend and business partner, to rape [the complainant] and [J] only intervened when she realised there might be a second incident, and maybe she thought enough might be – that's enough.

[29] In summarising the Crown case, the Judge put it this way:

> As to the evidence of [N] and [J] that they did not hear any screaming which required them to go to the room. Mr Gibson submits to you, either they sadly misunderstood what they had heard, or they simply took no action.

The Court of Appeal judgment

[30] The appeal to the Court of Appeal relied on grounds additional to those with which we are concerned. We need say nothing about them.

[31] The argument of present relevance was that the evidence of why J and N did not go to the complainant's assistance was critical to the defence in that it bolstered their credibility while undermining that of the complainant. It was submitted that an application under s 23A for leave to lead the evidence should have been made and should have been granted. The jury were not given the full picture, to the disadvantage of the appellant.

[32] The grounds of appeal advanced in the Court of Appeal included the ground that:

> Crucial evidence from Crown witnesses J and N relating to noises allegedly made by the complainant when having consensual sex with her boyfriend on previous occasions was "absent".

This ground of appeal was treated by the Court as raising the issue "whether defence counsel's failure to seek leave under s 23A amounted to radical error". That was not how the matter had been put by Mr Lithgow, for the appellant. He had submitted simply that the absence of the evidence amounted to a miscarriage of justice. The Court of Appeal preferred to recast the ground as one of counsel error:

> [21] It is clear that the "absent" evidence was not admissible as of right, because of s 23A of the Evidence Act. Ms Ord [trial counsel] did not apply for leave to call the evidence. There can be, therefore, no criticism of either the Judge or the prosecutor for the fact that this evidence was not called. This potential evidence was known to defence counsel, but she chose not to make the application. This ground of appeal can succeed only if it can be shown that defence counsel, in failing to apply, made a "radical mistake or blunder": see *R v Pointon* [1985] 1 NZLR 109 (CA). Mr Lithgow shied away from accusing Ms Ord of having made an error of that sort, but that must be in truth the focus of this ground of appeal. It is not a recognised ground of appeal simply to point to other evidence which might have been called, at least in circumstances where such evidence was known to counsel at the time of the trial.

[33] Given this focus, the Court of Appeal considered whether defence counsel at the trial should have made an application under s 23A and whether, if such application had been made, it would have been granted. Only then would it become necessary to consider whether the further evidence would have assisted the jury in determining whether to believe the complainant or J and N. The Court considered that it was "necessary to determine whether Ms Ord's decision not to seek leave under s 23A was plainly wrong, i.e. without foundation":

> [37] The court will not lightly interfere with a verdict on the ground of counsel error in the management of the defence, and will do so only if there is shown to be a mistake so radical as to justify ordering a new trial on the grounds that there was a likelihood of a consequential miscarriage of justice (*R v Paparahi* (1993) 10 CRNZ 293 at 297 (CA)). In that case this Court accepted that defence counsel was "not without some foundation" for his view of the law on the point at issue, and therefore there was not radical error on counsel's part.

While it was "possible" that the trial Judge might have been persuaded to exercise his discretion under s 23A to grant an application for leave, had one been made, there were "substantial arguments to the contrary". There was no certainty that leave would have been granted. "And being a decision in the exercise of the Judge's discretion, had he refused leave, it is unlikely that his decision would have been upset on appeal." The Court pointed to "significant potential downsides for the defence" had any such application been successful: the jury might have been unimpressed so that the evidence might ultimately have proved adverse. That potential would have to be weighed by experienced counsel. The Court concluded that the ground of "radical error" had not been made out:

> [45] It is unnecessary for us to determine whether an application under s 23A would have been successful. Given the high threshold presented by s 23A and the other relevant factors to which we have referred, there was at least some proper foundation for the decision of defence counsel not to seek leave under s 23A. Consequently there was no radical error by defence counsel.

[34] On the complaint of misconduct by the prosecutor the Court rejected the argument that it was not open to Crown counsel, knowing the witnesses J and N had reason for not going to the complainant's assistance, to submit that they were sadly mistaken or "sat callously". The Court said that both submissions were open to the prosecutor on the evidence that was before the jury. Further, the Court said that even if that evidence of J and N had been before the Court, the submission that they were "sadly mistaken" would still have been open.

The submissions

[35] For the appellant Mr Lithgow submitted that the Court of Appeal was wrong in its approach to the fact that the jury did not hear the evidence of J and N as to their familiarity with sounds made by the complainant during consensual sex. He argued that in principle the focus on counsel error is wrong and that the only enquiry should be as to the safety of the verdict – that is, whether there has been a miscarriage of justice. In this case the Court of

Appeal should have determined whether leave under s 23A to cross-examine on the matter should have been granted. In his submission it should have been. There was evidence critical to the defence that was not before the jury so that the appellant was denied a fair chance of acquittal.

[36] It was submitted that it should not matter how a trial irregularity arose – whether by error or misjudgment of counsel or otherwise. The essential issue is whether the verdict is safe. Counsel referred to the dictum of Lord Steyn in *Benedetto v The Queen*:[4]

> A defendant should be punished for the crimes he has committed, not for the failure of his representatives to conduct his defence as they ought.

[37] Mr Lithgow was critical of the reliance by the Court of Appeal on the decision in *R v Paparahi* which, he said, was not discussed at the hearing in that Court. His criticism was that in principle a search for "radical error" by trial counsel, as well as being unnecessary, is dysfunctional because it sets the advocate against his or her own client. It hinges the appellant's success prospects on an examination of counsel in respect of whom there is a presumption of competence.

[38] With reference to s 23A it was submitted that on an application to cross-examine J and N in respect of noises they had heard from the complainant in the past, it would have been appealable error if leave had not been granted. He submitted that the reliability of the two witnesses was critical to the defence and their familiarity with the noises, because they had been heard on previous occasions, was highly relevant and exclusion of the evidence was contrary to the interests of justice. He contended that there was no tactical advantage seen in not applying for leave, nor did any arise.

[39] Mr Lithgow submitted that the matter was exacerbated by the prosecutor, in effect, wrongly taking advantage of the s 23A (rape shield) provision by submitting to the jury that the two witnesses were "sadly

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[4] [2003] 1 WLR 1545 at [65] (PC).

mistaken" or callously sat by. That, he said, contravened the principle that, unless declared hostile, a witness cannot be attacked as to credit by counsel by whom he or she is called. He referred to s 9 of the Evidence Act which, he said, exemplified that general principle.

[40] For the Crown, Mr Horsley submitted that the approach to alleged errors by trial counsel is well established and not inconsistent with that in other comparable jurisdictions. The law does not require review. He accepted that the overarching test is whether a miscarriage of justice has arisen but that the focus on counsel error is an appropriate starting point, as indicated in *R v Pointon.*[5]

[41] Mr Horsley submitted that the case involved a clear decision by trial counsel not to pursue the admissibility of the evidence in question. The Court of Appeal was correct in finding that there was a proper foundation for counsel's decision which therefore could not be regarded as a "radical error". It was submitted that, even if an application under s 23A had been made, it would inevitably have been refused. Further, counsel argued that cross-examination pursuant to a successful application carried significant risks for the defence, as the Court of Appeal had accepted. These should be weighed even though trial counsel did not advert to them in her affidavit. The ultimate issue is whether there was a radical error that occasioned a miscarriage of justice. The test is not subjectively what was in counsel's mind.

[42] In support of his arguments directed to both the potential risks for the defence and the unlikelihood that a successful s 23A application would have succeeded, counsel referred to the general nature of the cross-examination of J, N and the complainant directed at showing the complainant in an unfavourable light. It was said that the cross-examination of J and N might have been seen as merely further character blackening of the complainant consistent with the general theme of the defence. There was said also to be

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[5] [1985] 1 NZLR 109 (CA).

the risk of exposure of credibility problems, particularly relating to N, and of bringing into sharper focus their bias against the complainant. It was submitted also that the real issue was not whether J and N correctly interpreted the sounds but whether they were telling the truth in their evidence so directly opposed to that of the complainant.

[43] With reference to the submission made to the jury by the prosecutor, it was submitted that s 9 of the Evidence Act does not prevent a prosecutor from pointing out inconsistencies in the evidence of Crown witnesses nor from inviting the jury to prefer certain evidence. It was acknowledged that the prosecutor's comment came "perilously close to overstepping the mark" but counsel submitted that it would have had minimal effect on the trial and could not be said to have given rise to a miscarriage of justice.

[44] The submissions relating to the recent complaint evidence, so far as is necessary to deal with that ground of appeal, are referred to later in these reasons.

The ground of appeal – miscarriage of justice

[45] In New Zealand the approach of the Court of Appeal to appeals advanced on the ground of errors, incompetence or misconduct of defence counsel at trial has been as outlined in *R v Pointon*.[6] In that case, Cooke J, for the Court, after referring to the "extreme category" illustrated by *R v McLoughlin*[7] of counsel acting contrary to express and definite instructions, said:

> A mere mistake in tactics in the conduct of the defence does not of course afford ground for a new trial. This Court has to be on guard against any tendency of accused persons who have been properly and deservedly convicted to put the result down, not to the crime committed, but to the incompetence of counsel. An accused who has acquiesced in his counsel's advice not to go into the witness box himself or not to call other witnesses will usually have great difficulty

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6 At 114.
7 [1985] 1 NZLR 106 (CA).

> in showing any miscarriage of justice on that account. *R v McLoughlin* does not entrench on that long-standing position.
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> …
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> But it is established that rare cases do arise in which it becomes necessary to hold that in the conduct of the defence there have been mistakes so radical that the ground (miscarriage of justice) specified in s 385(1)(c) of the Crimes Act 1961 is made out: see *R v Horsfall* [1981] 1 NZLR 116, 123. Such cases do not turn on whether or not there has been negligence. That is not the issue. Miscalculations can occur for which counsel, perhaps making tactical decisions under pressure, is not necessarily to be criticised. Nevertheless they can force an appellate Court to treat the trial as unsatisfactory.

[46] In England, since 1995 the relevant statutory ground of appeal has been simply that the conviction is "unsafe".[8] The reported decisions reflect a trend away from an "epithet-driven"[9] approach with tests such as of "flagrant incompetence" of counsel. In *R v Clinton*[10] Rougier J said:

> It is probably less helpful to approach the problem via the somewhat semantic exercise of trying to assess the qualitative value of counsel's alleged ineptitude, but rather to seek to assess its effect on the trial and the verdict according to the terms of the subsection.

[47] That case was decided under an earlier Act in which the relevant ground was that the conviction was "unsafe or unsatisfactory" but the difference is immaterial for present purposes. In *R v Day*[11] Buxton LJ said:

> While incompetent representation is always to be deplored; is an understandable source of justified complaint by litigants and their families; and may expose the lawyers concerned to professional sanctions; it cannot *in itself* form a ground of appeal or a reason why a conviction should be found to be unsafe. We accept that, following the decision of this court in *Thakrar* [2001] EWCA Crim 1096, the test is indeed the single test of safety, and that the court no longer has to concern itself with intermediate questions such as whether the advocacy has been flagrantly incompetent. But in order to establish lack of safety in an incompetence case the appellant has to go beyond the incompetence and show that the incompetence led to identifiable errors or irregularities in the trial, which themselves rendered the process unfair or unsafe.

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[8] Criminal Appeal Act 1968 (UK), s 2 (as amended by the Criminal Appeal Act 1995).

[9] See Rt Hon Justice Blanchard "Counsel Incompetency as a Ground for Appeal" in New Zealand Law Society *Criminal Law Symposium* (8 November 2002).

[10] [1993] 1 WLR 1181, 1188A (CA).

[11] [2003] EWCA 1060 at [15].

[48] This approach is to be considered in conjunction with recent references to extreme cases in which the impact of the fundamental human right to due process or a fair trial is apparent. In *Teeluck v State of Trinidad & Tobago*[12] the Privy Council appears to have recognised two levels of counsel error, one in which unsafety of the verdict is assumed and the other where that must be demonstrated:

> There may possibly be cases in which counsel's misbehavior or ineptitude is so extreme that it constitutes a denial of due process to the client. Apart from such cases, which it is to be hoped are extremely rare, the focus of the appellate court ought to be on the impact which the errors of counsel have had on the trial and the verdict rather than attempting to rate counsel's conduct of the case according to some scale of ineptitude: see *Boodram v The State* [2002] 1 Cr App R 103, para 39; *Balson v The State* [2005] UKPC 2; and cf *Anderson v HM Advocate* 1996 JC 29.

[49] These recent cases indicate that while the ultimate question of the safety of the verdict is the primary concern, the conduct of counsel still has been considered where that is said to have given rise to the claimed unsafe verdict.

[50] In the United States of America the Supreme Court's approach rests on the constitutional right to counsel under the Sixth Amendment. That is held to mean the right to the effective assistance of counsel, and the proper measure of attorney performance is reasonableness under prevailing professional norms. The majority opinion in *Strickland v Washington*[13] identifies two components of a claim of defective counsel assistance. An appellant must show both errors so serious that the constitutional right was denied and prejudice to the defence raising a reasonable probability that the outcome would have been different. In special cases, such as counsel's conflict of interest, prejudice may be presumed. The judgment emphasises the need for appellate courts to be "highly deferential" in scrutiny of counsel's performance.

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[12] [2005] 1 WLR 2421 at [39].
[13] 446 US 668 (1984).

[51] The relevant statutory ground of appeal in Canada is substantially the same as our s 385(1)(c), "on any ground there was a miscarriage of justice".[14] The Supreme Court of Canada in *R v B(GD)*[15] has recognised a right to the effective assistance of counsel. The Court, in cases raising ineffective assistance, has largely adopted the approach of the United States Supreme Court in *Strickland v Washington.* For the Court, Major J wrote:[16]

> Incompetence is determined by a reasonableness standard. The analysis proceeds upon a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. The onus is on the appellant to establish the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The wisdom of hindsight has no place in this assessment.
>
> Miscarriages of justice may take many forms in this context. In some instances, counsel's performance may have resulted in procedural unfairness. In others, the reliability of the trial's result may have been compromised.
>
> In those cases where it is apparent that no prejudice has occurred, it will usually be undesirable for appellate courts to consider the performance component of the analysis. The object of an ineffectiveness claim is not to grade counsel's performance or professional conduct. The latter is left to the profession's self-governing body. If it is appropriate to dispose of an ineffectiveness claim on the ground of no prejudice having occurred, that is the course to follow (*Strickland*, *supra* at 697).

[52] The position in Australia cannot be stated as briefly nor as precisely because of the variations in approach among members of the High Court of Australia. The criminal appeal provisions are substantially the same as those in Canada and New Zealand. Until the recent judgments of the High Court to be mentioned next, the New South Wales Court of Appeal judgment of Gleeson CJ in *R v Birks*[17] (with which McInerney J agreed) was generally cited as stating the law. He gave this summary of the relevant principles:

> 1. A Court of Criminal Appeal has a power and a duty to intervene in the case of a miscarriage of justice, but what amounts to a miscarriage of justice is something that has to

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[14] Canadian Criminal Code, s 686(1).
[15] [2001] 1 SCR 520.
[16] At [27] – [29].
[17] (1990) 19 NSWLR 677, 685 (CCA).

> be considered in the light of the way in which the system of criminal justice operates.
>
> 2. As a general rule an accused person is bound by the way the trial is conducted by counsel, regardless of whether that was in accordance with the wishes of the client, and it is not a ground for setting aside a conviction that decisions made by counsel were made without, or contrary to, instructions, or involve errors of judgment or even negligence.
>
> 3. However, there may arise cases where something has occurred in the running of a trial, perhaps as a result of "flagrant incompetence" of counsel, or perhaps from some other cause, which will be recognised as involving, or causing, a miscarriage of justice. It is impossible, and undesirable, to attempt to define such cases with precision. When they arise they will attract appellate intervention.

[53] It is the subsequent trend away from the focus on "flagrant incompetence" by some members of the High Court that is of particular interest. The circumstances with which the Court was concerned in *TKWJ v The Queen*[18] bear considerable similarity to those in the case before us. Defence counsel elected not to call evidence of good character believing it would expose his client to prejudicial rebuttal evidence from a witness K. Counsel did not consider asking the trial judge to rule on the admissibility of the prejudicial rebuttal evidence. Gleeson CJ, citing *Birks*, considered the decision of defence counsel understandable and certainly not self-evidently unreasonable.[19] He assumed that a ruling excluding the evidence of K might have been given (though that was, in the circumstances, speculative) but held that a rational tactical decision not to seek a ruling did not make the trial unfair or produce a miscarriage of justice.

[54] Gaudron, Gummow and Hayne JJ determined that there was no power for the trial judge to give an advance ruling so no miscarriage of justice could arise from a failure to seek a ruling. Hayne J, with whom Gummow J agreed, emphasised:[20]

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[18] (2002) 212 CLR 124 (HCA).
[19] At [8].
[20] At [107] - [108].

> No less importantly, however, it follows from the characteristics of a criminal trial which I have identified that, when it is said that a failure to call evidence which was available to the defence at trial has led to a miscarriage of justice, the question presented to an appellate court requires an objective inquiry, not an inquiry into the subjective thought processes of those who appeared for, or advised, the accused at trial. The relevant question is not: why did counsel not lead the evidence, or was counsel competent or incompetent? It is: *could* there be any reasonable explanation for not calling the evidence?
>
> If there could not be any such explanation, there may have been a miscarriage of justice. It would then be necessary to go on to ask whether the jury would have been likely to entertain a reasonable doubt about guilt if the evidence had been led. If, however, there *could* be a reasonable explanation for not calling the evidence, that will be the end of the matter. It is not to the point then to inquire whether counsel did or did not think about the point, or acted incompetently or incompetently, even though the conclusion that there could be no reasonable explanation for the course followed at trial would seem to entail the conclusion that counsel did not act competently.

[55] The fullest review of the applicable principles is set out in the opinion of McHugh J. That review must be considered with that Judge's subsequent agreement with the opinion of Hayne J in *Ali v The Queen*.[21] And at this point it is sufficient to note his citation of *Birks*, and his view that the test of miscarriage of justice in cases of this kind ordinarily subsumes the two issues of material irregularity and prejudice to the outcome. He recognised, however, that there will be cases where counsel's conduct may deprive an accused of a fair trial (when prejudice is assumed) and cases where, even though the error involved is forensic choice or judgment on the part of counsel not amounting to "flagrant incompetence", a miscarriage of justice may have occurred.

[56] In *Ali* the conduct of counsel in a murder trial was criticised before the High Court on a number of grounds. Gleeson CJ cited *Birks* and *TKWJ v The Queen* but found the conduct of trial counsel was not shown to have fallen below ordinary standards of professional competence. The joint opinion of Callinan and Heydon JJ reviewed extensively the errors trial counsel was said to have made. They concluded, however, that although counsel did make

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[21] (2005) 214 ALR 1.

some errors he was not shown to have been flagrantly incompetent and it had not been shown that any such conduct deprived the appellant of a fair chance of acquittal.

[57] The opinion of Hayne J, with which McHugh J agreed, includes:[22]

> As McHugh J pointed out in *TKWJ v The Queen* "[t]he critical issue in an appeal like the present is not whether counsel erred in some way but whether a miscarriage of justice has occurred". The conduct of counsel remains relevant as an intermediate or subsidiary issue because the issue of miscarriage of justice in a case such as the present requires consideration of the two questions which McHugh J identified in *TKWJ*. Did counsel's conduct result in a material irregularity in the trial? Is there a significant possibility that the irregularity affected the outcome? But the ultimate question is whether there has been a miscarriage of justice.

[58] These cases show some variations in approach in the different jurisdictions to the issue of when an accused must be held to the consequences of the conduct of his or her case by counsel. The common principle is that prejudice to the outcome of the trial is the trigger for appellate intervention. In rare cases in which counsel incompetence is such that the defendant can be said to have had no effective representation, prejudice is presumed. In the more usual cases of alleged error or incompetence the conduct is measured against a reasonableness standard. But even when that standard is not met, material prejudice to the defence must be established.

Waiver

[59] Of interest having regard to New Zealand practice in respect of waiver of privilege is this comment in the opinion of Hayne J in the *Ali* case:[23]

> An appellate court does not and may not know what information trial counsel had when deciding whether or not to object to evidence. That is why, in *TKWJ*, I concluded that the question of miscarriage does not turn on a factual inquiry into why trial counsel acted or did not act in a particular way. That kind of inquiry cannot be made.

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[22] At [18].
[23] At [25].

> Rather, the question is whether there *could* be a reasonable explanation for the course that was adopted at trial. If there could be such an explanation, it follows from the fundamental nature of a criminal trial as an adversarial and accusatorial process that no miscarriage of justice is shown to have occurred.

[60] This and similar comments in the recent judgments of the High Court of Australia, referring to the absence of any explanation by trial counsel of reasons for the events about which they were criticised, suggest that it may not be a usual practice in Australia to require a waiver of privilege so that the courts may have explanations from trial counsel. That contrasts with the position in England where the guidance of the Bar Counsel has been approved[24] and with the current practice of the New Zealand Court of Appeal.[25]

[61] In some cases, such as where there is an allegation that counsel failed to follow instructions, it seems unlikely that the matter could be investigated satisfactorily without a waiver of privilege and comment from counsel. In other cases, where what occurred is apparent from the record, waiver of privilege may not arise. Legal professional privilege attaches to communications. In addition, however, counsel may be under obligations of confidence which must be respected.

[62] Care is needed in requiring, or advising, a waiver of privilege or confidence. They may be important rights which clients should give up only after full advice. While an explanation from counsel may help the court, clients must fully appreciate possible implications. However, nothing turns on waiver in the present case.

A principled approach to appeals raising alleged counsel error

[63] Section 385, which provides the relevant ground of appeal, reads:

> **385 Determination of appeals in ordinary cases –**

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[24] *R v Doherty* [1997] 2 Cr App R 218, 219.
[25] Court of Appeal (Criminal) Amendment Rules 2005, r 12A.

…

(1) On any appeal to which subsection (1AA) applies, the Court of Appeal or the Supreme Court must allow the appeal if it is of opinion –

(a) That the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence; or

(b) That the judgment of the Court before which the appellant was convicted should be set aside on the ground of a wrong decision on any question of law; or

(c) That on any ground there was a miscarriage of justice; or

(d) That the trial was a nullity –

and in any other case shall dismiss the appeal:

Provided that the Court of Appeal or the Supreme Court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

[64] We are presently concerned with subs (1)(c). Miscarriages of justice may arise from many causes. The conduct of defence counsel in handling the trial is but one possible cause. Conduct giving rise to criticism can occur in many different contexts. There may be acts or omissions in the course of preparation, there may be failure to follow direct instructions from the client, there may be incompetence through inexperience, there may be inadequate or wrong advice to the accused. Often the consequence may be that evidence was or was not (as is alleged here) put before the jury. There may be reasons for that, there may be good reasons, or there may not. They may accord with instructions. They may be based on confidential information in the possession of counsel.

[65] Where error or irregularity is alleged and attributed to counsel, but that would not have affected the outcome – was not material – there will be no need to analyse and judge the conduct of counsel. On the other hand, where the complaint is that counsel's conduct was such as effectively to deny

the accused representation to fairly present the defence, prejudice to the outcome will be readily found – and in extreme cases may need no enquiry.

[66] There will be cases in which particular acts or omissions of counsel may in retrospect be seen to have possibly affected the outcome but they were deliberately judged at the time to be in the interests of the accused. In some cases the accused will have agreed or acquiesced – only to complain after conviction. Where the conduct was reasonable in the circumstances the client will not generally succeed in asserting miscarriage of justice so as to gain the chance of defending on a different basis on a new trial. Normally an appeal would not be allowed simply because of a judgment made by trial counsel which could well be made by another competent counsel in the course of a new trial.

[67] But there will be cases, rare cases, as was recognised in *Pointon*, where the conduct of counsel, although reasonable in the circumstances in which it occurred, nevertheless can be shown to have given rise to an irregularity in the trial that prejudiced the accused's chance of acquittal (or conviction of a lesser offence) such that the appeal court is satisfied there was a miscarriage of justice. The court will always reserve the flexibility to identify and intervene to prevent a miscarriage of justice however caused.

[68] Often these cases will be able to be analysed without examining the quality of counsel's conduct. For example, where the effect was that vital evidence was not placed before the jury it might be appropriate to enquire directly whether that gave rise to a miscarriage of justice, although that will need to be considered in light of principles governing the admission of further evidence on appeal, including any explanation for its absence from the trial.

[69] It is necessary to emphasise that the statutory ground of appeal justifying intervention is that there was a miscarriage of justice. That was clearly recognised in *Pointon*. The focus therefore is on outcome, with the cause providing context. There has been a trend in judgments since *Pointon*, including that of the Court of Appeal in this case, to overlook this and to

regard the need to find some "radical" error by trial counsel as a necessary precondition of any consideration of appellate intervention. This seems to stem from reading "radical" simply as "serious" whereas it was clearly intended in *Pointon* to carry its correct meaning of fundamental. A "radical" error thus is one that goes to the root of the trial process – one that is likely to have affected the outcome. In that sense it is not a precondition of a miscarriage of justice; it raises a risk of a wrong verdict and so itself constitutes a miscarriage of justice. There is no threshold enquiry necessary into the seriousness of counsel's conduct. In this respect the term "radical error", with its pejorative connotation and the tendency to equate it with "serious error", is perhaps better avoided.

[70] In summary, while the ultimate question is whether justice has miscarried, consideration of whether there was in fact an error or irregularity on the part of counsel, and whether there is a real risk it affected the outcome, generally will be an appropriate approach. If the matter could not have affected the outcome any further scrutiny of counsel's conduct will be unnecessary. But whatever approach is taken, it must remain open for an appellate court to ensure justice where there is real concern for the safety of a verdict as a result of the conduct of counsel even though, in the circumstances at the time, that conduct may have met the objectively reasonable standard of competence.

This case

[71] The error said to have been made by trial counsel is failure to seek leave under s 23A of the Evidence Act to cross-examine the witnesses J and N (and presumably the complainant) with reference to the complainant's previous sexual experience, specifically the noises made by her during consensual sex.

[72] Trial counsel's affidavit states that she did not think leave would be granted. She makes no comment about the wisdom of seeking leave and taking advantage of it should it be granted.

[73] We consider there would have been an arguable case for granting leave and we are prepared to proceed on the assumption that, had it been sought, leave should have been given, but limited to that particular matter. The real issues are whether, in not seeking leave, counsel's decision was one competent counsel would not have made and whether a miscarriage of justice likely resulted. If the decision not to seek leave to cross-examine on the point was one reasonably competent counsel could have reached, i.e. there would be good reason not to make the application, no miscarriage of justice can have flowed from trial counsel not doing so.

[74] If an application to cross-examine had been made, there would have been available arguments for opposing leave on the ground that the reliability of J and N should be weighed in the exercise of the Judge's discretion. These might even have required investigation on a voir dire.

[75] If leave were granted there was a real risk that the evidence already obtained before the jury would be considerably undermined by any attempt to strengthen it by the further cross-examination proposed. J had told the jury that to her the sounds she heard at the time of the alleged rape were like someone having normal sex next door because she had heard no screaming. N had told the jury she had heard a scream that was like the satisfied sound of a person having intercourse: "It was quite loud, some girls do make a loud noise".

[76] If cross-examined on her statement to the police it appears N would have said further that she had heard this type of screaming coming from the complainant before "when she was having sex with her boyfriends", and that she had "said to her before that she screams quite loud". But, on the evidence, N first met the complainant on 24 February – after her boyfriend had gone away. She did not live at the Miramar flat, she went there only "a couple of times", and did not know the complainant very well.

[77] Had J been cross-examined on her statement to the police, made nearly a month after N had made her police statement, it seems she would

have added that she had heard the sounds before when the complainant was in her room with her boyfriend – that the complainant is quite noisy when she has sex.

[78] Once it is apparent that, on the evidence, N could not have heard the complainant having intercourse with her boyfriend, there arises an issue of possible collusion between J and N which would not be lessened by the relationships between them and with the appellant, whom they accompanied to the police station when he went to make his statement.

[79] It would have been well open to counsel, when considering whether to seek leave under s 23A, to consider that the risks associated with bringing out the further evidence from the police statements could undermine the evidence already before the jury. There may have been the further risk of antagonising the jury by appearing to lead evidence simply to reflect adversely on the complainant's character. In seeking to bolster the credibility of J and N the very opposite might have resulted. Accordingly we consider competent counsel could well have decided not to seek leave under s 23A. It cannot be said, therefore, that not doing so gave rise to a miscarriage of justice.

[80] In this case, however, counsel submitted, it is known from trial counsel's affidavit, that she did not make any assessment of the risks inherent in seeking to bring out the additional evidence. But we do not accept that miscarriage of justice is to be determined solely by reference to the subjective assessments of counsel. There must be an objective measure of that assessment as well as of its potential impact on the trial.

[81] Mr Lithgow would have preferred to have the appeal considered simply on the basis that there was evidence helpful to the defence which was not before the jury with the result that the appellant's prospects of acquittal were diminished; how that occurred would not be relevant. The Court of

Appeal should, he said, have addressed directly whether a miscarriage of justice arose. He himself did not address the admissibility of the additional evidence on appeal, it having been available at the time of trial. The conduct of trial counsel would seem relevant to that.

[82] But approaching the matter as counsel advocated leads to the same result. We are not persuaded that the additional evidence could have affected the verdict. The evidence that the witnesses J and N heard sounds from the complainant that they considered to be of her participation in consensual sexual activity was called as part of the prosecution duty to put before the court witnesses essential to the unfolding of the narrative of the events, whether or not their evidence supports the prosecution case.[26] The defence relied upon the evidence on the critical question of consent. It was evidence from which the defence invited the jury to infer that the complainant had consented. Such evidence, although effectively a matter of impression or opinion expressed as a conclusion from observed facts, is admitted because of the impossibility of conveying the information in any other way:[27]

> Unless opinions, estimates and inferences which men in their daily lives reach without conscious ratiocination as a result of what they have perceived with their physical senses were treated in the law of evidence as if they were mere statements of fact, witnesses would find themselves unable to communicate to the judge and accurate impression of the events they were seeking to describe.

Being a matter of impression, however, it is evidence that may well be mistaken, as the prosecution was entitled to point out.

[83] The material evidence of the witnesses' impression was given without challenge as to the basis for their belief. The evidence that they had heard similar sounds from the complainant on an earlier occasion when she was

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[26] *Seneviratne v R* [1936] 3 All ER 36, 49 (PC).

[27] 17th report of the English Law Reform Committee, para 3. And see Heydon (ed) *Cross on Evidence* (7th Australian ed 2004) paras 29010, 29095.

having consensual sexual intercourse was evidence capable of answering any such challenge as to recognition. In the absence of such challenge, the additional evidence at best was evidence which explained or bolstered the impression referred to by the witnesses. Such evidence is of slight probative value unless some explanation is called for. It cannot generally be led from a witness in evidence in chief.[28] The opinion or impression which formed the material evidence of value to the defence was a conclusion drawn from ordinary human experience. The witnesses were not expert witnesses who needed to qualify their ability to give such conclusions as evidence. In those circumstances, the additional evidence added nothing of real significance to the evidence they gave. The potential evidence of marginal assistance to the defence could not be separated from other potential evidence which was adverse to the credibility of the witnesses. Any modest bolstering of the credibility of the witnesses' impressions has to be seen in the context of the evidence as a whole. It included not only the complainant's evidence and evidence from others of her distress following the events but compelling medical evidence of injuries which were extremely unlikely to have eventuated from consensual activity. In those circumstances the absence of the evidence here relied on is not shown to have raised any doubt about the safety of the verdicts.

The prosecutor's statement to the jury

[84] The principle that a party calling a witness cannot impeach his or her credit is not in doubt. Except by having the witness declared hostile a party may not cross-examine or attack honesty or credibility. Those principles find expression in the cases and in s 9 of the Evidence Act which reads:

> **How far witness may be discredited by the party producing him**
>
> A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but may contradict him by other evidence.

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[28] *Palmer v R* (1998) 193 CLR 1 at [49] per McHugh J; *R v Turner* [1975] QB 834, 842 (CA).

[85] In *R v Cairns*[29] Keene LJ, for the Court said:[30]

> When prosecution counsel in his final speech started to cast doubt upon the credit of his own witness, he was stopped by the judge on the normal principle that a party is not entitled to attack the credit of its own witness unless it seeks, and is permitted, to treat that witness as hostile. That is the principle which received statutory recognition in the Criminal Procedure Act 1865 (Denman's Act), s 3.
>
> But the prosecution is entitled to call other evidence which contradicts part of the evidence of its witness, while still relying on those parts of his evidence which are not to be contradicted: see Article 147 of Stephen's Digest of the Law of Evidence, 12th ed (1936), approved in *R v Prefas & Pryce*, (1988) 86 Cr App R 111, 114. That approach indeed was recognised in *Pacey*[31] where at p 20 of the transcript the Court said this:
>
> > "It was not open to the prosecutor to attack her credit. All they could do was to point to inconsistencies, if they existed, between her evidence and other evidence or to point to matters upon which her evidence might be reliable."
>
> So it is clear, in our view, that the prosecution may properly call a witness when they rely on one part of his evidence but not on another part. Whether they choose to call such a witness is a matter for their discretion, to be exercised on the principles which we have already set out. But that does not amount to an attack on their own witness's credit.

[86] The qualification that counsel may invite preference for inconsistent evidence is important in light of the duty upon a prosecutor in a criminal case to call relevant evidence. A prosecutor often must lead contradictory evidence from different witnesses. Necessarily that means inviting juries to accept some of the evidence and reject other evidence – even from the same witness.

[87] The issue in the present case is whether there was evidence on the basis of which the prosecutor could invite the jury to reject the explanations of why J and N did not intervene when, on the complainant's evidence, she

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29 [2003] 1 Cr App R 38 (CA).
30 At [37] – [39].
31 *R v Pacey* The Times, March 3, 1994.

was calling for help. Counsel said they were either mistaken sadly or just left her to it – "callously sat there".

[88] It is apparent that the prosecutor considered there was a sufficient basis in the evidence for what he said. Earlier in his address, when reviewing the evidence of the conduct of the complainant after the event, he referred to the evidence, which J confirmed, that the complainant eventually left the house without telling J why she was leaving. Counsel said:

> That evidence only points one way. The reason why [the complainant] didn't want to speak to [J], the reason she was angry with her and [N] is obvious. Plainly she thought that they had sat by and they did nothing earlier that morning, while she was raped in her bedroom by [N's] brother.

[89] Before that, counsel had reviewed the evidence of the complainant's anger, indeed rage, towards J and N. She had screamed at them, thrown the telephone at them.

[90] The complainant's evidence included the following answers. When asked about J entering the room when the second man V was there she said:

> She came to my bed, close to my bed, but I was real mad. I was yelling at her as well, 'cos I really hope she could come help me before, but she didn't.

[91] Referring to the time after she had had a bath and drunk vodka she gave this evidence.

> Q. And did either [J] or [N] speak to you when you went back into the lounge from the bathroom?
>
> A. Yeah [N] went to – I think [N] and [J], they both went to the lounge, but I was real drunk and I was real mad I was just yelling at them and asked them leave me alone.
>
> Q. And did either of them come over to you to try and speak to you?
>
> A. I remember [N] put her hands on my shoulder, but I really – I really don't want it – I really don't want her to touch me, you

know, just like – I don't think I hate her, but I just try like, ask her to go away from me.

Q. And why were you angry at [J] and [N] at that time?

A. 'Cos I'm pretty sure I was loud enough to let everyone else hear me in that house, but nobody – nobody came to help me.

In cross-examination her evidence was:

Q. If you'd made yelling or screaming noises or yelled no, your flat mates would've heard wouldn't they?

A. I think they would.

Q. Mmm, and they would've come and helped you wouldn't they?

A. But they didn't.

Q. But when you did yell and scream, that's –

A. But I did.

Q. - exactly what [J] did didn't she?

A. I did – I did yelling, but she – nobody came.

…

Q. Now, [J] tried to ask you what happened that night, didn't she?

A. [She] knew what happened. At least I think [she] should know what happened.

Q. And [N], she came out to the lounge to try and help you too, didn't she?

A. I don't think so. I don't think any of them try to help me, if any of them trying to help me, they all came before this thing happened.

[92] There was ample evidence on which counsel could have submitted to the jury that they should accept, as the complainant believed, that J and N heard her cries for help but did not come to her aid. In the course of

argument Mr Lithgow accepted that if the prosecutor had phrased his submission as " … or [as the complainant believed] just callously sat there …" there could be no objection. In light of counsel's earlier references to the complainant's anger towards J and N and the reason for it, the absence of the reference to her belief could not be regarded as giving rise to a miscarriage of justice.

[93] We are satisfied there was an evidential foundation for the prosecutor's submission.

[94] We do not see this as an instance of a prosecutor inappropriately taking advantage of the shield provided by s 23A. Even if the evidence of J and N's claims to have heard similar sounds when the complainant was engaging in consensual sex had been before the jury, the prosecutor still could have made the same submission to the jury based on the complainant's evidence corroborated by the evidence of others as to her distress and behaviour.

The complaint evidence

[95] The final ground of appeal can be dealt with briefly. It raises no point of general principle and cannot have had any effect on the trial.

[96] It was submitted that the trial Judge was wrong to have ruled inadmissible evidence of a witness to whom the complainant spoke by telephone later in the day of the incident. The Judge ruled out this evidence because the complainant did not actually tell the witness she had been sexually violated. The witness assumed she had been raped from what he was told by someone else to whom the complainant had made an earlier garbled telephone call. Defence counsel wanted the evidence to be given as of recent complaint so that it could be relied upon as showing inconsistency with the evidence given by the complainant. The point of alleged inconsistency was that when asked by the witness "who was it?", the complainant was said to have answered "two friends of [J]".

[97] We accept, as counsel submitted, that evidence of recent complaint can be relied upon by the defence to show inconsistency with the complainant's evidence given at trial just as it can be relied upon by the Crown to show consistency. But in this instance we are quite unable to see any inconsistency that might have been exploited by the defence. The complaint at best was brief and without any detailed description of what occurred. The reference to two persons was quite consistent with the evidence at trial that two persons entered the complainant's room, though the second was not said to have reached the point of sexual assault.

[98] It was submitted further that, because of the erroneous exclusion of the evidence of first complaint, the evidence of a later complaint to another witness was wrongly admitted because it was not made at the first reasonable opportunity. But even if it had been a second complaint, contrary to our conclusion in the previous paragraph, it was made the same day and was followed almost immediately by the complaint to the police so that its impact on the outcome of the trial would have been less than minimal.

[99] This ground of appeal is rejected.

[100] We have considered the grounds advanced cumulatively but we are not persuaded that the Court of Appeal erred and would dismiss the appeal.

TIPPING J

[101] The principal issue in this appeal concerns the circumstances in which trial counsel's conduct of the defence case can give rise to a miscarriage of justice.[32] Broadly speaking, those circumstances are of two kinds. The first is when counsel does not follow the accused's instructions. The present is not a case of that kind. The second is when counsel's conduct (be it act or omission) is said to have prejudiced the accused's prospects of an acquittal or a more favourable verdict.

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[32] For the purposes of s 385(1)(c) of the Crimes Act 1961.

[102] For this second type of case the appropriate starting point is the well known decision of the Court of Appeal in *R v Pointon*.[33] Following the decision in that case a practice has developed of requiring, as a pre-condition to any intervention by the Court, that counsel's conduct amount to a radical error, in the sense of a serious or major error. If the relevant act or omission of counsel cannot be so characterised, the tendency has been to stop the inquiry at that point, irrespective of what consequences may have flowed from counsel's conduct.

[103] The trend of authority, representing what might be described as slippage from *Pointon*, can be evidenced by reference to decisions of the Court of Appeal in the years 1993 and 2004, together with the Court's decision in the present case and a citation from *Adams on Criminal Law*. In *R v Paparahi*,[34] the Court said "…. the Court's power to interfere is in all cases predicated upon there having been a radical mistake by counsel, …". In *R v I*[35] the Court said: "The established threshold of demonstrating 'radical' or 'fundamental' error is a high one. It is not met by pointing to decisions made by trial counsel which, as matters turned out were probably wrong, or could be said to have been tactically incorrect." *Adams* describes what the learned authors call the "threshold test" for this sort of appeal as being whether counsel have made a "radical mistake or blunder".[36]

[104] Finally, in the present case the Court of Appeal, consistently with the general slippage from *Pointon*, said that the ground of appeal being discussed could succeed:[37]

> only if it can be shown that defence counsel, …, made a 'radical mistake or blunder': see *R v Pointon*… . Mr Lithgow shied away from accusing Ms Ord of having made an error of that sort but that must be in truth the focus of this ground of appeal.

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33 [1985] 1 NZLR 109 (Cooke, Somers and Eichelbaum JJ).
34 (1993) 10 CRNZ 293, 298.
35 CA172/04 16 December 2004 at [19].
36 At para 385.13(2).
37 CA979/03 11 August 2004 at [21].

[105] I do not agree with this trend of authority for reasons to which I will come. Nor do I consider it is the approach which *Pointon* envisaged. The critical passage in the judgment which Cooke J delivered for the Court in that case reads:[38]

> A mere mistake in tactics in the conduct of the defence does not of course afford ground for a new trial. This Court has to be on guard against any tendency of accused persons who have been properly and deservedly convicted to put the result down, not to the crime committed, but to the incompetence of counsel. An accused who has acquiesced in his counsel's advice not to go into the witness box himself or not to call other witnesses will usually have great difficulty in showing any miscarriage of justice on that account. *R v McLoughlin* does not entrench on that long-standing position. Here there may have been acquiescence, however reluctant, although counsel did not set any doubt at rest and protect himself by the precaution of obtaining signed authority not to call his client.
>
> But it is established that rare cases do arise in which it becomes necessary to hold that in the conduct of the defence there have been mistakes so radical that the ground (miscarriage of justice) specified in s 385(1)(c) of the Crimes Act 1961 is made out: see *R v Horsfall* [1981] 1 NZLR 116, 123. Such cases do not turn on whether or not there has been negligence. That is not the issue. Miscalculations can occur for which counsel, perhaps making tactical decisions under pressure, is not necessarily to be criticised. Nevertheless they can force an appellate Court to treat the trial as unsatisfactory.

[106] The key phrase for present purposes is "mistakes so radical". It is clear from the next sentence that the Court envisaged that a sufficiently radical mistake could occur without negligence on counsel's part. *Horsfall*'s case is referred to as supporting or illustrative of the "mistakes so radical" sentence. That no doubt was a reference to the statement in *Horsfall* that the Court would need to be satisfied that counsel's mistake "could well have had a significant prejudicial effect on the outcome of the trial".[39]

[107] It is abundantly clear that in *Pointon* the Court was not using the concept of a radical mistake to denote a high level, let alone any level, of negligence. Perhaps, with hindsight, the phrase "mistakes so radical" was not a particularly happy choice of words. The *Pointon* Court must have intended

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[38] At 114.
[39] At 123.

that the concept of radical mistake should concern the consequences of, rather than the nature of, counsel's conduct. A mistake was to be regarded as sufficiently ("so") radical if it led to a real risk of an unsafe verdict. It cannot have been the intention of the *Pointon* Court that the concept of radical mistake should become, in itself, a kind of self-contained touchstone or pre-condition requiring a sharp focus on the seriousness of the mistake or error, divorced from its effect.

[108] The phrase "mistakes so radical", when properly understood, does have the virtue of demonstrating the duality of what is required to constitute a miscarriage of justice. The word "mistake" denotes the need for something to have gone wrong with the way in which the appellant was represented at trial. The words "so radical", as I have noted earlier, indicate that whatever has gone wrong must have given rise to a real risk of an unsafe verdict.

[109] There are three related reasons why the slippage from *Pointon* is unsatisfactory. The first is that recent cases have inappropriately moved the focus from effect to cause. The Court does not get to examine the effect unless the asserted cause reaches a high level of ineptitude. The second is that the slippage overlooks *Pointon*'s clear statement that negligence is not the issue. Recent cases have come to regard negligence, and at a high level, as a pre-condition to the finding of a miscarriage of justice. I do not consider this to be correct in principle. My third reason is that recent cases, in their purported application of *Pointon*, have effectively departed from the statutory ground of appeal, which is whether there has been a miscarriage of justice. There can be a miscarriage without high level error on counsel's part.

[110] Against that background I move on to discuss what the correct approach should be. Before an appellant can succeed in an appeal involving a complaint about counsel's conduct, the appellant must demonstrate a miscarriage of justice.[40] What then are the ingredients of a miscarriage of justice for this purpose? Ordinarily two things must be shown. First,

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[40] Section 385(1)(c) of the Crimes Act 1961.

something must have gone wrong with the trial or in some other relevant way. Second, what has gone wrong must have led to a real risk of an unsafe verdict. That real risk arises if there is a reasonable possibility that a not guilty (or a more favourable) verdict might have been delivered if nothing had gone wrong. It is, of course, trite law that an appellant does not have to establish a miscarriage in the sense that the verdict actually is unsafe. The presence of a real risk that this is so will suffice.[41]

[111] I have said that ordinarily two things must be shown to establish a miscarriage of justice. The reservation implicit in the word "ordinarily" is necessary because sometimes, albeit rarely, things may have gone so badly wrong that a miscarriage of justice will have occurred without reference to whether there is a real risk of an unsafe verdict. Conversely, in other rare cases, the Court may find it appropriate to intervene on account of a real risk of an unsafe verdict without specifically identifying anything which can be said to have gone wrong. The real risk will itself be enough to constitute a miscarriage without the need to identify a specific error or irregularity as its cause.

[112] Cases of the former (so badly wrong) kind arise when the problem or problems with the trial are so fundamental that the minimum standard of a fair trial[42] has not been reached. The lack of a fair trial in itself represents a miscarriage of justice without any need to consider the impact of the problem or problems on the verdict.[43]

[113] It is desirable to make brief reference to how this approach relates to the operation of the proviso to s 385(1) of the Crimes Act. The lettered paragraphs of s 385(1) describe things that can go wrong with a criminal trial. Paragraph (c) is, of course, the general miscarriage provision and is apt to cover the multiplicity of problems that can arise in criminal trials. The

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41 See *Tuia v R* [1994] 3 NZLR 553, 555 (CA) and the cases there cited.

42 Section 25(a) of the New Zealand Bill of Rights Act 1990.

43 *R v Howse* [2005] UKPC 9, judgment 19 July 2005; and *Wilde v The Queen* (1988) 164 CLR 365. See also *R v Griffin* [2001] 3 NZLR 577, 587 per Richardson P, Blanchard and Tipping JJ, and *R v Forbes* [2001] 1 AC 473, 487 (HL).

proviso to s 385(1) says that the Court may dismiss the appeal, notwithstanding it is of opinion that the point raised ought to be decided in favour of the appellant, if it considers that no substantial miscarriage of justice has actually occurred. There is a degree of awkwardness in the relationship between paragraph (c) and the proviso.[44] If the proviso is applied, the Court has found both that there has been a miscarriage of justice and that no substantial miscarriage of justice has actually occurred. On my analysis of s 385(1)(c) this awkwardness is eliminated because there is no room to apply the proviso once a s 385(1)(c) miscarriage of justice has occurred. Analysing a miscarriage for paragraph (c) purposes as involving both defect and impact effectively fuses paragraph (c) and the proviso. The purposes of the proviso are already subsumed in the criteria for establishing the ground.

[114] There is no disadvantage to appellants, or indeed the Crown, in this. If there is a real risk of an unsafe verdict it cannot be said that no substantial miscarriage of justice has actually occurred. The same applies if the trial has not been fair. Just as paragraph (a) of s 385(1) cannot logically be susceptible to the application of the proviso, so too paragraph (c), construed in this way, is not susceptible to its application either. The result is that the operation of the proviso is likely to be focused primarily on s 385(1)(b) which deals with erroneous legal decisions. In that context it is relatively easy to contemplate an erroneous legal decision which cannot sensibly have given rise to any real risk of an unsafe verdict and hence cannot have led to a substantial miscarriage of justice.

[115] It follows that, when counsel's conduct is said to have given rise to a miscarriage of justice, the Court must ask itself first, whether something can fairly be said to have gone wrong with the process of justice in the way the appellant was represented at the trial. If that is so, the Court must then ask itself whether what has gone wrong has deprived the appellant of the reasonable possibility of a not guilty or more favourable verdict. If the answer is no, there will be no real risk of an unsafe verdict and thus no

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[44] See *R v McI* [1998] 1 NZLR 696, 711 (CA).

miscarriage of justice. If the answer is yes, there will have been a miscarriage of justice, irrespective of whether what has gone wrong amounts to negligence on counsel's part. It may sometimes be convenient to start with the second question. If the appellant has not been deprived of the reasonable possibility of a more favourable verdict, that will ordinarily[45] be the end of the matter.

[116] It is appropriate to emphasise that this approach should not be regarded as giving the appellant the ability to speculate on what the outcome might have been if different tactical or other decisions had been made, or different advice had been given by counsel as to the content or presentation of the defence. Nor should the appellant be able to rely on speculative points to impugn counsel's advice which he has accepted or acquiesced in at the time. The appellant must establish a real as opposed to a speculative risk of an unsafe verdict and must show that the impugned conduct of counsel has clearly caused that risk. If, as in this case, there was potential for both advantage and disadvantage to the appellant in a course which he claims counsel should have taken, the reality of the risk to the verdict must be assessed with both those aspects in mind.

[117] I turn now to relate the foregoing to the circumstances of the present case. What has gone wrong, according to the appellant, is that further evidence was not elicited from J and N so as to enhance the credibility of their evidence of hearing what they claimed to be consensual sounds. There were dangers for the appellant in eliciting that evidence as well as relatively small potential benefits. I will not repeat what Gault J has said in that respect. Whether, overall, the jury might have seen the additional evidence as being to the appellant's advantage or to his disadvantage is extremely difficult to say. It would, in my view, be no more than speculation to conclude, as the appellant would have us do, that had the evidence been before the jury its presence would have given rise to the reasonable possibility of an acquittal.

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[45] Unless the high threshold of an unfair trial is reached.

[118] The case did not turn solely on the credibility of the complainant. Her own evidence was supported by medical evidence suggesting that the physical symptoms she displayed were "extremely unlikely" to have resulted from consensual intercourse. I am inclined to think that had an application been made for leave to elicit the evidence, it should have been granted. But the potential perils in adducing the evidence make it difficult to characterise its absence as something which went wrong with the trial. Furthermore, I am not persuaded that its absence gives rise to any real risk of an unsafe verdict. Hence the appellant has not demonstrated that a miscarriage of justice has resulted from counsel's conduct in not seeking to have the evidence admitted.

[119] There is nothing I wish to add to what Gault J has written in relation to the other grounds of appeal. I agree with his conclusions. For these reasons I would dismiss the appeal.

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